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2000

# State of Utah v. Bert James Durrant : Petition for Rehearing

Utah Supreme Court

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BRIEF

~~14478~~ APR

IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH, :  
Plaintiff-Respondent, :  
vs. : Case No. 14478  
BERT JAMES DURRANT, :  
Defendant-Appellant. :

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BRIEF IN SUPPORT OF  
APPELLANT'S PETITION FOR REHEARING

---

APPEAL FROM A JUDGMENT OF THE FOURTH  
JUDICIAL DISTRICT COURT, IN AND FOR  
UTAH COUNTY, STATE OF UTAH, THE  
HONORABLE ALLEN B. SORESENSEN, JUDGE,  
PRESIDING

---

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FILED

APR 25 1977

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BRIEF IN SUPPORT OF  
APPELLANT'S PETITION FOR REHEARING

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STATEMENT OF THE CASE ON APPEAL

Appellant Bert James Durrant appealed a conviction of automobile homicide from the Fourth Judicial District, in and for Utah County, State of Utah, to this Court, alleging that the trial court committed reversible error in: (1) admitting in evidence an analysis of a blood specimen which was illegally seized from Appellant, and (2) refusing to instruct the jury on "criminal negligence" as the specific intent required for the commission of automobile homicide pursuant to Utah Code Annotated, 76-5-207, enacted L. 1973, Ch. 196, and in affirmatively instructing the jury that the offense was established by proof of "simple" or "ordinary" negligence.

#### DISPOSITION OF THE CASE ON APPEAL

On March 14, 1977, this Court entered a judgment in this case, affirming the judgment of the trial court. This Court unanimously found that the blood specimen taken from Appellant was not illegally seized and that it was proper for the trial court to admit an analysis of the specimen as evidence at trial. This Court, by a decision of three to two Justices, also found that the trial court did not err in refusing to instruct the jury on "criminal negligence" as the specific intent required for the commission of automobile homicide pursuant to Utah Code Annotated, 76-5-207, enacted L. 1973, Ch. 196, and in affirmatively instructing the jury that the offense was established by proof of "simple" or "ordinary" negligence. • State of Utah v. Bert James Durrant, Case No. 14478, S. Ct., Utah, Mar. 14, 1977, Maughn, J. and Wilkins, J., dissenting.

#### RELIEF SOUGHT ON REHEARING

Appellant seeks to have this Court reverse its judgment, entered March 14, 1977, with respect to its holding that the trial court did not commit reversible error in refusing to instruct the jury on "criminal negligence" as the specific intent required for the commission of automobile homicide pursuant to Utah Code Annotated, 76-5-207, enacted L. 1973, Ch. 196, and in affirmatively instructing the jury

that the offense was established by proof of "ordinary" or "simple" negligence.

#### ARGUMENT

POINT I. IN HOLDING THAT THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY THAT "ORDINARY NEGLIGENCE" IS THE INTENT REQUIRED FOR THE COMMISSION OF AUTOMOBILE HOMICIDE, THIS COURT IGNORES THE PROVISIONS OF U.C.A., 76-5-201, 76-2-201, AND 76-2-103(4), AND RELIES ON CASE LAW WHICH HAS BEEN SUPERCEDED BY THESE RECENTLY ENACTED STATUTES.

The trial court instructed the jury that the negligence required for the commission of automobile homicide consisted in "ordinary" or "simple" negligence. Instruction No. 8 provided:

Negligence is the failure to use ordinary and reasonable care in the management of one's property and person. It is the failure to do what an ordinary and reasonable person would have done under the circumstances, or the doing of what such a person would not have done. The fault may lie in acting or in omitting to act.

Instruction No. 6 provided:

Under the law of this State any person, while under the influence of intoxicating liquor to a degree which renders him incapable of safely driving a vehicle, who causes the death of another by operating or driving any automobile in a negligent manner on a public highway or street shall be deemed guilty of a felony.



Conceding that "ordinary" negligence was all that was necessary to convict a person of automobile homicide under prior Utah law as set forth in Utah Code Annotated, 76-30-7.4, enacted L. 1957, repealed by L. 1973, Ch. 196, Appellant argued on appeal, that under the new Criminal Code adopted by the Utah Legislature in 1973,<sup>1</sup> the offense of automobile homicide had been redefined and included as a form of an offense designated "criminal homicide" which requires the specific intent of, at least, "criminal negligence" for its commission. (Ap. Br. on App., at 13, 14)

Appellant was convicted under Part 2, Criminal Homicide, Ch. 5, Offenses Against the Person, of the new Criminal Code.

Section 76-5-201, as enacted L. 1973, Ch. 196, provides:

(1) A person commits criminal homicide if he intentionally, knowingly, recklessly or with criminal negligence unlawfully causes the death of another.

(2) Criminal homicide is murder in the first and second degree, manslaughter, or negligent homicide, or automobile homicide.

The new automobile homicide statute, 76-5-207, enacted L. 1973, Ch. 196, under which Appellant was convicted, provides:

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<sup>1</sup>"Utah Criminal Code", Utah Code Ann., 76-1-101, et. seq. (1953), enacted L. 1973, Ch. 196.

(1) Criminal Homicide constitutes automobile homicide if the actor, which under the influence of intoxicating liquor, a controlled substance, or any drug, to a degree which renders the actor incapable of safely driving a vehicle, causes the death of another by operating a motor vehicle in a negligent manner.

Under the new Criminal Code, automobile homicide is designated as one form of the offense of criminal homicide. The State Legislature has confined the offense of criminal homicide to encompass those homicides in which a person "intentionally, knowingly, recklessly, or with criminal negligence unlawfully causes the death of another."

Section 76-2-101, enacted L. 1973, Ch. 196, provides:

No person is guilty of an offense unless his conduct is prohibited by law, and

(1) He acts intentionally, knowingly, recklessly or with criminal negligence with respect to each element of the offense as the definition of the offense requires; or

(2) His acts constitute an offense involving strict liability.

Section 76-2-103(4), enacted L. 1973, Ch. 196, defines the specific intent of "criminal negligence", providing that:

A person engages in conduct:

\* \* \*

(4) With criminal negligence or is criminally negligent with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint.

On appeal, Appellant contended that the instruction concerning his negligence should have described the specific intent required by the above cited statute. Appellant noted that a problem arises in interpreting the "intent" required for the commission of automobile homicide, because the automobile homicide statute, 76-5-207, enacted L. 1976, Ch. 196, refers only to the "negligent" operation of a motor vehicle which results in the death of another. Appellant argued that the criminal homicide statute, 76-5-201, enacted L. 1973, Ch. 196, encompasses and controls the automobile homicide statute, and that, therefore, this Court should reconcile the meaning and application of these two statutes, by interpreting the term "negligence" in the automobile homicide statute to require "criminal negligence" as specified in the criminal

homicide statute. Appellant further argued that this interpretation was supported by those sections of the new Criminal Code generally governing the imposition of criminal responsibility. (Ap. Br. on App., 14) In addition, Justice Maughn correctly notes in his dissenting opinion herein, in which he is joined by Justice Wilkins, that the criminal homicide provisions of the new Criminal Code are patterned after Article 210, A.L.I. Model Penal Code, Proposed Official Draft, May 4, 1972. The Comments to that Code clearly reveal that the drafters of the criminal homicide provisions believed that liability for vehicular homicide should not be imposed in the absence of negligence of the character defined as "criminal negligence" in Utah Code Annotated, 76-2-103(4), enacted L. 1973, Ch. 196, of the new Criminal Code. State of Utah v. Bert James Durrant, Case No. 14478, Maughn, J., joined by Wilkins, J., (Dissenting Opinion).

Respondent, on appeal, made no effort to reconcile the "negligence" provision of the automobile homicide statute, 76-5-207, enacted L. 1973, Ch. 196, with the "criminal negligence" requirement of the criminal homicide statute, 76-5-201, enacted L. 1973, Ch. 196. In fact, Respondent does not even acknowledge the existence of the criminal homicide statute or those statutes cited by Appellant (Ap. Br. on App., at 14)

which govern the imposition of criminal responsibility under the new Criminal Code, and provide that no act shall be punishable under the Code, unless the conduct prohibited is undertaken with the specific intent of at least, "criminal negligence", except where the offense is a strict liability offense. (R. Br. on App., 13-15) Respondent merely asserted on appeal that the wording of the automobile homicide statute which refers to the "negligent" operation of a vehicle, and prior case law, including this Court's decision in State v. Risk, 520 P.2d 215 (Utah, 1974), permit automobile homicide under the new automobile homicide statute, 76-5-207, enacted L. 1973, to be proved by showing that the actor was "ordinarily" negligent in the operation of a motor vehicle which results in the death of another. (R. Br. on App., 12-15).

Although this Court recognized the apparent anomaly between the "negligence" provision of the automobile homicide statute and the "criminal negligence" requirement of the criminal homicide statute, the Court reconciled the meaning and application of those two statutes by completely ignoring the definition of "criminal negligence" provided in Section 76-2-103(4) of the new Criminal Code, and by adopting a different definition of the term based on Ballentine's Law Dictionary and several court decisions of this Court and others, which Appellant

submits are no longer authoritative on the question of what constitutes the specific intent of "criminal negligence" in the face of the State Legislature's recent adoption of Utah Code Annotated, 76-2-103(4), enacted L. 1973 (1973). State v. Bert James Durrant, Case No. 14478, S. Ct. Utah, Mar. 14, 1977, at 2-3.

This Court accepted Respondent's contention that State v. Risk, 520 P.2d 215 (Utah, 1974), is authority for the proposition that "the offense of automobile homicide can be proved by simple negligence" under current law. State of Utah v. Bert James Durrant, Case No. 14478, S. Ct. Utah, Mar. 14, 1977, at 3. However, this Court's decision in Risk is not dispositive of the instant case for several reasons.

First, the question of the intent necessary for the commission of automobile homicide - "ordinary" versus "criminal" negligence, posited in this case - was not before the Court in Risk. Indeed, the Appellant there prefaced his argument on appeal by conceding that "the offense of automobile homicide, Utah Code Ann., 76-30-7.4 (1953), requires only ordinary negligence." State v. Risk, 520 P.2d 215 (Utah, 1974), Ap. Br. on App., at 2, citing State v. Johnson, 12 Utah 2d 220, 364 P.2d 1019 (Utah, 1961).

Second, and more important, by the time this Court

decided Risk in 1974, the Utah Legislature had expressly repealed the automobile homicide statute under which the defendant Rish was convicted,<sup>2</sup> and adopted a new Criminal Code, the "Utah Criminal Code", Utah Code Annotated, 76-1-101, et. seq., enacted L. 1973, which redefined automobile homicide as a form of the offense of criminal homicide, and provided, for the first time, that the specific intent of "criminal negligence" was required for the commission of the offense.

#### CONCLUSION

The instant case is the first in which this Court has been asked to rule on the state of mind required for the commission of automobile homicide under the pertinent statutes of the new Criminal Code. Appellant submits that a proper reading of the automobile homicide statute, placing it in the context of the criminal homicide statute which encompasses and controls its provisions, together with reference to other provisions of the new Criminal Code and the legislative history thereof, compel the conclusion that the specific intent required for the commission of automobile homicide is "criminal negligence". Therefore, Appellant respectfully requests this Court to reverse its prior judgment and hold that the trial court erred in

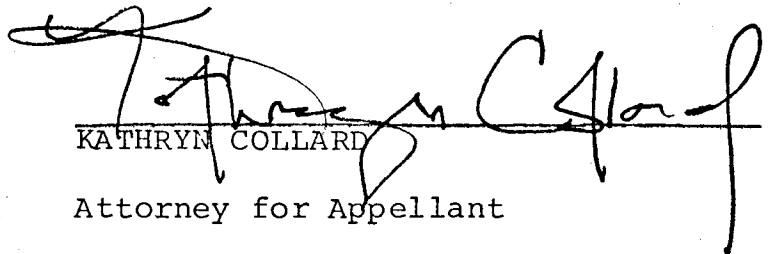
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<sup>2</sup>Utah Code Ann., 76-30-7.4 (1953), as amended (1953). Repealed by L. 1973, Ch. 196.

instructing the jury that automobile homicide requires only  
"simple" or "ordinary" negligence for its commission.

DATED this 25th day of April, 1977.

Respectfully submitted,

  
KATHRYN COLLARD  
Attorney for Appellant

I HEREBY CERTIFY that I delivered a true and correct  
copy of the foregoing Brief In Support Of Appellant's Petition  
For Reharing to Vernon B. Romney, Attorney General and Earl F.  
Dorius, Assistant Attorney General, 236 State Capital Building,  
Salt Lake City, Utah this 25th day of April, 1977.

